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THE SOURCES OF INTERNATIONAL LAW.[1]

I.

The Law of Nations, or International Law, is a body of rules recognized as binding on civilized independent states in their dealings with one another and with one another's subjects.[2] Treaties and conventions between particular states may define any portion of those rules, or add to or vary the existing rules, but any conventional rule so laid down is binding only on the parties to it. Acts of this kind may go to show, according to the nature of the case and the particular circumstances, the existence of general usage which the parties wished to record for convenience in apt words and an authentic form (though this is not common), or the dissatisfaction of the parties with existing usage and their desire to improve on it, or the absence of any settled usage at all antecedent to the particular agreement. It is, therefore, impracticable, with one exception to be mentioned, to make any general statement as to the value of treaties and similar instruments as evidence of the law of nations. The exceptional case, which is of increasing frequency and

[1] Preliminary notes for a chapter intended to form part of the Cambridge Modern History planned by the late Lord Acton. We are indebted for this article to the courtesy of the *Law Quarterly Review*, in which it appeared in England, and by which we were given the right of simultaneous publication in America.

[2] "The sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another": Lord Russell, of Killowen, addressing the American Bar Association in 1896, L. Q. R., xii. 313.

importance, is where an agreement or declaration is made made not by two or three states as a matter of private business between themselves, but by a considerable proportion, in number and power, of civilized states at large, for the regulation of matters of general and permanent interest. Such acts have of late been the result of congresses or conferences held for that purpose, and they have been so framed as to admit of and invite the subsequent adhesion of Powers not originally parties to the proceedings. There is no doubt that, when all or most of the great Powers have deliberately agreed to certain rules of general application, the rules approved by them have very great weight in practice even among states which have never expressly consented to them. It is hardly too much to say that declarations of this kind may be expected, in the absence of prompt and effective dissent by some Power of the first rank, to become part of the universally received law of nations within a moderate time. As among men, so among nations, the opinions and usage of the leading members in a community tend to form an authoritative example for the whole. A striking proof of this tendency was given in the war of 1898 between Spain and the United States. Neither belligerent was a party to the article of the Declaration of Paris of 1856 against privateering; the United States had in fact refused to join in it. Moreover, the Declaration of Paris was not, in point of form, an instrument of the highest authority. Nevertheless, when the war of 1898 broke out, the United States proclaimed its intention of adhering to the Declaration of Paris, and the rules thereby laid down were in fact observed by both belligerents. It is quite possible that some of the recommendations recorded at the Peace Conference at the Hague in 1899 may sooner or later, in like manner, be adopted as part of the public law of civilized nations by general recognition without any formal ratification.

On the whole, then, the law of nations rests on a general consent which, though it may be supplemented, influenced, and to some extent defined, by express convention, can never be completely formulated under existing conditions. This is as much as to say that the law of nations must be classed with customary law. Sometimes it is supposed

that, so far as it is not included in authentic acts of state, it is at the mercy of opinions expressed by private writers; and this, among other topics, is made use of to argue or suggest that the very existence of any law in international matters is fictitious. The answer given by the highest legal authorities of the English-speaking world is that the opinions of experienced and approved publicists are valuable, not as mere opinions, but as evidence: "Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." These are the words of Mr. Justice Gray, delivering the majority opinion of the Supreme Court of the United States in a recent case.[1] A century earlier Lord Stowell had relied on Vattel, "not as a lawyer merely delivering an opinion, but as a witness asserting the fact—the fact that such is the existing practice of modern Europe."[2] Where publicists give us, or we have otherwise at hand, the means of testing their conclusions, we are as free to use those means as in any ordinary historical inquiry. This does not, however, make their testimony worthless, as one or two modern writers and judges appear to have supposed.

According to one school of opinion, the rules of international law bind the conscience of nations because they are rules of universal reason, and the consent of nations, express or tacit, is only evidence that the rules actually in force are allowed as reasonable, and therefore probably are so. Or, to use the appropriate technical terms, the law of nations, in the view of this school, is nothing else than a branch of the law of nature. There is much historical truth in this, as we shall presently see. Modern international law came and was received in the name of the law of nature to which both spiritual and temporal rulers had long professed allegiance. But for any other purpose the speculative question seems hardly worth pursuing. All jurisprudence which deals with actual claims of right in the world of actual human contentions has to accept as reasonable that which is generally deemed so by reasonable persons dealing with the matter in hand. Now it cannot be supposed that

[1] The Paquete Habana (1899) 175 U. S. 677.

[2] The Maria, (1799) 1 Rob. Adm. at p. 363.

the whole body of civilized States should consent to what they did not think reasonable, or that the rulers of such States fall far short of the moral and intellectual standard of an average prudent citizen. On the other hand, it is an universal principle of jurisprudence that in cases otherwise doubtful the rule or interpretation which gives the most reasonable results to be applied; and the law of nations is as much entitled to the benefit of that principle as any other kind of law. The more we admit the analogy of international to municipal law, the less we shall expect it either to cover the whole field of moral duties, or to be reducible to a collection of ethical precepts demonstrated in a regular sequence from first principles. No Congress or Concert of the Powers—not to speak of Lord Stowell sitting in the Court of Admiralty—has ever claimed to be supreme in matters of faith and morals.

The imperfect state of the law of nations, in respect that it lacks a cosmopolitan judicial court with power to execute its decrees, is a well-worn topic. It has been discussed ever since Dante wrote his treatise *De Monarchia.* Some writers have used it as an argument, or have even supposed it to prove conclusively, that there is no such thing as a law of nations. With regard to this contention it seems fit to be considered that in the early history of all jurisdictions the executive power at the disposal of the courts has been rudimentary, if indeed they had such power at all. It is not universally true that even the highest courts in the most civilized modern states can always enforce their judgments. Thirty years before the American Civil War the State of Georgia defied the Supreme Court of the United States for eighteen months, with the open connivance of the President of the United States: "John Marshall has made the decision, now let him execute it." But the decision made by John Marshall stands as part of the law of the United States, and would do so even if its execution had been wholly frustrated in the particular case. In the Middle Ages there was nothing uncommon in rival courts within the same political allegiance obstructing one another's process and thwarting one another's jurisdiction in every way short of violence. More than this, courts have existed with an elaborate constitution and procedure and no com-

pulsory powers whatever. This is the state of things which we read of as prevailing in Iceland not much before the Norman Conquest. No doubt there are fabulous details even in those sagas, that of Njál, for example, which contain most historical matter; but their general account of society and institutions may be taken as truthful enough for our purpose.

It is quite true that, so far as the law of nations has been regularly administered by any courts, they have been the courts of particular states, often, though not always, deciding questions in which those states were interested. But such courts have always professed to administer a cosmopolitan, and not a merely municipal, law. They have honestly endeavored to find impartial guidance. At worst they may be in a position analogous to that of a judge in his own cause. It is best that a man should not be judge in his own cause; but, if we appeal to the analogy of municipal law and to the generally recognized maxims of justice, we shall find that, in case of need, a judge in his own cause is better than a total default of justice and judgment, and that the magistrate who finds himself in that position must hear and determine the cause, forgetting his own interest in it so far as he can.

It is rather commonly assumed that all disputes between sovereign states are analogous to those which cause litigation between individuals, and therefore equally capable of being settled by some judicial process if only an adequate judicial authority were provided. Unfortunately this is not the case. One class of international controversies, those which relate to boundaries and territorial rights, may be said to present an almost perfect analogy to questions between private owners. The main problem, in cases of this kind, is to find an arbitrator, or devise an arbitral tribunal, whose decision will command the respect of both parties. The definition of the question or questions to be submitted may or may not be troublesome. It can hardly be arrived at without some sort of preliminary agreement as to the extent of the matters which are reasonably open to discussion. But these difficulties are of the kind which, with good will and good faith, can be overcome. In fact many questions of boundaries and the like, which in former ages

would either have occasioned wars or furnished a convenient pretext for them, have in our own time been peaceably and honorably settled. Moreover, it may be said of these cases, and well supported by the analogy of similar ones in men's private affairs, that a decision given by competent persons after argument is more likely to be just in itself and, what is more, satisfactory to the parties, than a compromise arrived at by direct negotiation.

Other controversies turn on alleged breach or non-performance of active obligations arising out of the interpretation of treaties or official declarations, or out of the common customary duty of nations in particular circumstances, as where a breach of neutrality or excess in the exercise of a belligerent's rights against neutrals is complained of. Such cases are less apt for quasi-judicial treatment than the class first mentioned. It is harder to fix the common ground of admitted fact and to exclude hostile imputations and other inflammatory topics. Few questions are more delicate or indefinite than what can properly be held to amount to "unfriendly conduct" in a given case. The difficulties are increased if, as often happens, no permanent settlement is possible without laying down regulations for future action which will amount in effect, if not in form, to a new convention. In cases of this class it may well be the better way to arrange the whole matter by direct negotiation. Even where the settlement has taken the form of arbitration, it may be found that, in determining the questions to be referred to the arbitrator, some or most of the substantial points in issue have really been conceded by one or the other party. This was so, to mention a leading example, in the "Alabama" dispute between Great Britain and the United States.

But the most dangerous grounds of difference between states are those which do not admit of reduction to definite issues at all, or which can be reduced only to the ancient formula of Lucretius, *uter esset induperator*. Contests for supremacy or predominant influence are not a manageable subject of argument and decision. The formal pretexts for them may be weak, but this does not make the Powers involved more willing to invite or tolerate interference. The only perfectly effectual remedy is a coalition of Powers of

superior collective strength, determined that the peace shall not be broken. This, or the fear of it, has prevented a certain number of petty wars; but it can seldom be applicable to a war between states which are powerful enough to resent such interference, or divert it by new combinations. Friendly persuasion, tenders of good offices, and the other beneficent arts of diplomacy, may avert war between Great Powers, have certainly averted it sometimes, and possibly may have done so on occasions and in circumstances which a wise regard for the general interest of peace has hitherto kept secret. Whatever devices in the way of standing recommendations, committees of inquiry or conciliation, and the like, may serve to smooth the way for any such process, are highly to be commended. But, in the main, the responsibility for dealing with what are called questions of national honor and vital interests must rest, for a long time to come, with the Governments of the Great Powers themselves. Both the material and the moral considerations which make for prudence appear to have gained strength in the last generation. The material ones are obvious and notorious; the moral ones are as yet hardly capable of being expressed in any definite form, but are nevertheless operative. Meanwhile arbitration treaties, carefully framed so as to include only those cases where arbitration is really practicable, are to be desired and praised both for their direct and for their indirect utility, though they must not be supposed to be a panacea.

II.

The origin of the modern law of nations, as a distinct system of rules, is now to be shortly traced. There was a considerable resemblance, now almost forgotten, between the law of nations and another cosmopolitan body of secular custom, the law merchant, in the manner of their promulgation and acceptance. The law merchant has been so thoroughly assimilated by the national laws of all civilized countries that, as regards its separate existence, it may be said to have perished by the completeness of its own victory. But, like the law of nations, it was originally independent of municipal systems, and claimed the respect and

aid of local magistrates as a branch of the law of nature, considered as a body of rules demonstrable by natural human reason, and therefore entitled to universal obedience. It was the law of nature that was appealed to for the dialectic solution of national and dynastic controversies; it was in the name of the law of nature that, in England, Edward IV's Chancellor asserted the right of foreign merchants to have their causes tried without the "solemnities of the law of the land."[1] It is necessary to remember how potent this doctrine was among the publicists of the Middle Ages. The task of Grotius and his precursors and followers was to define and specialize a branch of the law of nature to which all men professed to bow, not to invent that which was ready to their hands. We should go far astray if we supposed that Gentili or Grotius revived the Roman lawyers' conceptions of *ius naturale* and *ius gentium* for a world which had forgotten them. In fact all political and moral discussion had long been dominated by an elaborate theory of the Law of Nature which may be traced to three distinct sources in the literature regarded as authoritative by the founders of mediæval learning. It was constructed, and quite openly constructed, in part on the Aristotelian texts which speak of natural justice, in part on the expositions of later Greek philosophical views, mostly Stoic, found in Cicero and other writers down to the Fathers of the Church, and in part on the technical development of those same views by Roman jurists in search of a theoretical basis for a law which, from being national or tribal, had become cosmopolitan.

All these fountains of authority were, for scholars of the twelfth and thirteenth centuries, little short of sacred. The Corpus Juris appeared to them, not as the historical record of republican and imperial jurisprudence in a heathen em-

[1] A. D. 1473, Y. B. 13 Ed. IV, 9, pl. 5. The law of nature had been incidentally recognized as "the ground of all law" not many years before, 8 Ed. IV, 12. It is not for us here to conjecture whether any scheme of policy in aid of royal power is indicated by these occasional dicta. We know that the Tudors afterwards found statute law their handiest instrument, and the Stuarts fell back on what they could make, or thought they could, of the Crown's prerogative at Common Law. The "divine right" theory in its English form is a clumsy and belated piece of speculative natural law, and a bad specimen of its kind.

pire, but as the deliverance of the orthodox emperor Justinian. The morality of Cicero had been stamped with all but unqualified approval in the repeated citations and comments of Christian and beatified authors. Of Aristotle's position it is needless to speak, for it is matter of common knowledge among all scholars. Warranted by such commanding names, the Law of Nature presented itself as a rule of human conduct independent of positive enactment and even of special divine revelation, and binding always and everywhere in virtue of its intrinsic reasonableness. Modern readers may be inclined to say that this law of nature, about which so much mystery has been made, turns out to be nothing but another name for the general principles of morality.[1] From a modern point of view such a remark is well justified. But we have to bear in mind that ethics, politics, and jurisprudence were anything but clearly divided from one another in mediæval thought. In fact the law of nature was of far more importance, both speculative and practical, in the political than in the moral field. And its political value did not escape the keen eyes of those who kept watch for the Church and the Holy See. So venerable a doctrine, though not owing its origin to the Church, could not be disregarded; it must be frankly accepted and supported. The law of nature, being divine, though discoverable by secular reason, could not be in conflict with the true faith or with the justice of righteous princes. Thus, not only Justinian, but Aristotle and Cicero, with their commentators, were enlisted, by a policy as wise as to us it may seem daring, as allies of the Church; and the unqualified supremacy of natural law stands in the very forefront of the Decretum of Gratian.[2] The general authority of the Church was thus confirmed or reinforced; but this did not secure a monopoly of interpretation to any particular official person or school.

From the early part of the fourteenth century onwards, if not earlier, it was found that the law of nature, like other

[1] Cf. Holland, Jurisprudence, 9th ed., p. 30.

[2] "Naturale ius inter omnia primatum obtinet tempore et dignitate. Cepit enim ab exordio rationalis creaturæ, nec variatur tempore sed immutabile permanet. * * * Moralia mandata ad naturale ius spectant atque ideo nullam mutabilitatem recepisse monstrantur."

instruments of dialectic, was capable of being a weapon in many hands. Champions of imperial and of papal claims wielded it vigorously against one another. But none of them ever doubted that the law of nature, when its judgment was once ascertained, was supreme over Pope and Emperor alike; though this did not apply to what was called secondary natural law, that is, consequential rules which would or might be reasonable in the absence of positive regulation, but may be modified by positive human law.[1] Appeals to the law of nature were hardly less frequent during the sixteenth and seventeenth centuries in the political and ecclesiastical controversies which followed the Reformation. Like a mediæval king, natural law had an indefinite prerogative of jurisdiction ready to be exercised whenever ordinary justice needed to be quickened or supplemented. Its new exercise of power was effected by giving fresh prominence to the most ancient part of the accepted doctrine.

III.

The classical term *ius gentium* had fallen rather out of fashion in the Middle Ages, but there was no reason why it should not be used, and it sometimes was. In the Renaissance period it came into fashion again, and the sixteenth-century writers, who are collectively known as precursors of Grotius, though they mostly wrote not as jurists or statesmen, but as moralists, used it freely, whether as a synonym for *ius naturale* or with distinctions of their own devising. The classical Roman lawyers had left no clear tradition on the relation of *ius naturale* to *ius gentium;* nor have their successors finally reconciled all the texts. It would be convenient to take *ius naturale* for the sum of rules of conduct which ought to be received because they are reasonable in themselves, and *ius gentium* for those which are received in fact by the general consent of civil-

[1] This is laid down by S. Thomas Aquinas, Sec. Secundæ, qu. lvii. *de iure.* arts. 2, 3. The secondary meaning of the law of nature acquired an exaggerated and even exclusive importance, in connection with the imaginary "state of nature," after the scholastic doctrine and its careful distinctions were forgotten. In the eighteenth century Montesquieu could fail to attribute any other meaning to "law of nature."

ized mankind. This would not prevent the two terms from being practically synonymous in a large proportion of instances, and it is certain that the Roman writers currently used them as convertible. There are traces of a theoretical distinction such as we have now indicated, but the materials are not sufficient for us to say how far it was generally recognized; at least that is the present writer's conclusion from the fact that eminent modern Romanists have differed on the point.

Alberico Gentili, who more than any other one man before Grotius may be called the pioneer of international law, founds himself expressly on this identity of the law of nations (not yet consciously understood in our modern sense) with the law of nature. He quotes the Roman jurists and Cicero by preference, but, though not on terms with the Church, retains so much respect for the scholastic tradition as to refer to the Latin Fathers. He regards the rules of the *ius gentium* as established by the continuing and general consent of mankind, "quod successive placere omnibus visum est:" this being, as he justly notes in anticipation of objectors, the only kind of proof by which unwritten law can ever be established.[1] But the same rules are likewise binding, in Gentili's view, as being prescribed by absolute and evident reason. Universal reason is manifested in the consent of reasonable men. As to the terminology, there is nothing to show that Gentili supposed, or wished any one to believe, that *ius gentium* meant exclusively or eminently the rules binding on states or governments, as between themselves. What he says is that princes and rulers in their dealings with one another, even in war, are subject to the rule of natural reason attested by general agreement, which may be indifferently called *ius gentium* or *ius naturæ*, according as we lay stress on one or the other element. Herein he assumes that the law of nature is always applicable in its broad principles. It is also generally applicable to provide specific rules, by way of deduction, in default of any other law and without prejudice, where a competent authority exists, to any positive law, not contrary to the universal principles of justice, which

[1] "Et vero ius non scriptum, ut hoc est, item ut consuetudo, aliter non inducitur."

may be made by that authority. This is the familiar scholastic distinction, which has been already mentioned, between the "primary" and the "secondary" law of nature. In the case of war between independent sovereigns there is no common positive authority; for Gentili, an exiled heretic,[1] could not admit that either the Pope or the Emperor was entitled to universal jurisdiction; and since the Reformation, at the very latest, it was obvious that neither of them was in fact in a position to exercise it. Hence we are thrown back upon the law of nature, not only for ultimate principles, but for the whole body of rules, which, when discovered, will constitute the *ius belli*. Still the author regards his task as a special problem in applying the law of nature to a class of cases which (as Gentili observes at the outset) has hitherto been neglected by systematic writers. It is the filling up of a gap in the existing framework, not a new construction greater than the old one. So did the whole of commercial law seem to acute English lawyers, far into the eighteenth century, a mere incident in the acquisition of title to personal property.

With Grotius the case is different. Grotius deliberately undertakes a new and large enterprise, and invents or appropriates terms for it. He defines his subject at the outset as "ius illud quod inter populos plures aut populorum rectores intercedit." Only Suarez and Hooker, it seems, had attained this clearness of language before him,[2] and neither of them had pursued the subject.

For Grotius there is not merely a logical possibility of applying natural law to the facts of war and diplomacy, nor would he be content to say that there is, or may be, a special chapter of natural law dealing with such matters.

[1] Alberico Gentili was "forced to leave his country for religion" as the Earl of Leicester's letter of commendation to the university of Oxford puts it (Holland, Alb. Gent. De Iure Belli, in præf. p. viii), though it does not appear whether the proceedings against him ever reached the stage of final condemnation.

[2] The value of Suarez's insight in the passage quoted by several modern writers (De Leg. II. xix. § 9) which concludes "ita in universo humano genere potuerunt iura gentium moribus introduci" is rather diminished by his assumption that the rules are very few and simple: "ea quæ ad hoc ius pertinent et pauca sunt et iuri naturali valde propinqua." Hooker shows a much juster notion of the magnitude of the subject, and indicates the division into rules applicable in time of peace and in time of war. It is tempting to suppose some private intercourse between Hooker and Gentili, but there is no evidence.

He sees that the conquest of this new field is not only practicable, but the most important thing to be done. The new development of *ius gentium* is to overshadow—as in the result it did—all its former achievements; the name of "law of nations" may be given by right of eminence to the science now called forth by the final establishment in Europe of many kingdoms and commonwealths acknowledging no human superior. Grotius may or may not have known that the classical meaning of *ius gentium*, which stands for all rules of conduct sanctioned by general usage, is capable of including whatever rules are customary as between sovereign states, and occasionally did include them in Latin literature.[1] He certainly knew that *gentes* is not the plural of *civitas* or *populus*, which are the only classical words for a state or nation in its political capacity, and he would not have risked such a neologism as *ius inter gentes*. The humanities were still fresh from conquest, and not disposed to be flouted. But Grotius was not above using a certain amount of linguistic artifice to convert the ancient authority of *ius gentium* to his own special purpose. Indeed the artifice was not altogether new. Suarez had spoken of *iura gentium* with what one may call a special international intention; Hooker had actually said in English that the "third kind of law," "which toucheth all such several bodies politic so far as one of them hath public commerce with another," *is*—not merely may be called, but "is the law of nations."[2]

Even more remarkable, at first sight, is the language used, a thousand years, as nearly as may be, before Grotius, by Isidore of Seville. His enumeration, as being *ius gentium*, of such matters as occupation of territory, war, treaties, peace and armistice, and the sanctity of ambassadors, might be incorporated in a modern text-book with little change.[3] Yet it is certain that whatever was in the mind of the good

[1] H. Nettleship, Contributions to Latin Lexicography, *s. v.*

[2] Eccl. Pol. I. x. § 12.

[3] "Ius gentium est sedium occupatio, ædificatio, munitio, bella, captivitates, servitutes, postliminia, fœdera, paces, induciæ, legatorum non violandorum religio, connubia inter alienigenas prohibita; et inde ius gentium quod eo iure omnes fere gentes utuntur." Isid. Hisp. Etym. V. 6 (in Migne, Patrol t. 40, p. 201); cited and more or less discussed by several modern writers, most profitably, perhaps, by Mr. Westlake.

bishop, preserving as best he might in the wreck of the Western Empire the antiquarian tradition of Festus and Aulus Gellius, anything like the modern law of nations was not. It would rather seem that his examples of general custom—for that is probably the nearest modern expression for what *ius gentium* signified to Isidore—were taken from public affairs, not because he thought them of special importance, but because private law had broken up into a multitude of tribal and personal customs, and it could no longer be said that there was any *ius gentium* in civil matters. The law of the Church was no doubt universal, but the effective assertion of its universality and the definition of its relation to the law of nature were both reserved for a later and more vigorous generation. It is possible, however, that Isidore's words represent a fragmentary extract from some earlier writer, made without intelligent attention to the context.[1] If so, nothing but the recovery of the lost context would help us much. Such as it was, Isidore's description of *ius gentium* was copied into the Decretum of Gratian, but without the honors of commentary; and it does not appear to have had any influence on mediæval thought or terminology. It is referred to by Alberico Gentili, but, apparently, not by Grotius.

On the whole, then, the common opinion is justified. The name of Grotius must always be pre-eminent when we speak of the establishment of the law of nations as a distinct body of doctrine. Many different theories have since been put forward, generally determined by the contemporary fashion in moral philosophy or by the writer's own philosophical predilections, rather than by any specific and appropriate development from within. It may therefore be not quite exact to say, in the accustomed phrase, that all subsequent workers have built on the foundation laid by Grotius. But we may safely say that at all events he assured the site.

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[1] The ultimate origin was, perhaps, the passage of Hermogenianus, of which a fragment is preserved to us in D. i. 1, 5.